

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, THE
LEAGUE OF WOMEN VOTERS OF NORTH
CAROLINA, DONNA PERMAR, JOHN P.
CLARK, MARGARET B. CATES, LELIA
BENTLEY, REGINA WHITNEY EDWARDS,
ROBERT K. PRIDDY II, WALTER
HUTCHINS, AND SUSAN SCHAFER,

Plaintiffs,

vs.

THE NORTH CAROLINA STATE BOARD OF
ELECTIONS; DAMON CIRCOSTA, in his
official capacity as CHAIR OF THE
STATE BOARD OF ELECTIONS; STELLA
ANDERSON, in her official capacity
as SECRETARY OF THE STATE BOARD OF
ELECTIONS; KEN RAYMOND, in his
official capacity as MEMBER OF THE
STATE BOARD OF ELECTIONS; JEFF
CARMON III, in his official
capacity as MEMBER OF THE STATE
BOARD OF ELECTIONS; DAVID C.
BLACK, in his official capacity as
MEMBER OF THE STATE BOARD OF
ELECTIONS; KAREN BRINSON BELL, in
her official capacity as EXECUTIVE
DIRECTOR OF THE STATE BOARD OF
ELECTIONS; THE NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION; J.
ERIC BOYETTE, in his official
capacity as TRANSPORTATION
SECRETARY; THE NORTH CAROLINA
DEPARTMENT OF HEALTH AND HUMAN
SERVICES; MANDY COHEN, in her
official capacity as SECRETARY OF
HEALTH AND HUMAN SERVICES,

Civil Action No. 20-cv-457

**PLAINTIFFS' OBJECTION TO
COURT'S PROPOSED JUDGMENT**

Defendants,

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Defendant-

Intervenors.

Plaintiffs Democracy North Carolina, The League of Women Voters of North Carolina, John P. Clark, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, and Susan Schaffer respectfully object in part to the Court's proposed judgment and order to dismiss the Fourth Amended Complaint with prejudice. Specifically, Plaintiffs respectfully object to the Court's proposed dismissal of Plaintiffs' Count Two with prejudice because applicable law and this Court's prior ruling require this claim to be dismissed *without* prejudice.

The Court has ruled that Plaintiffs' Count Two, the due process claim, is unripe. Doc. 224 at 33 ("Because there is a sufficient cure procedure currently in place in North Carolina, this court finds any injury to Plaintiffs is not

ripe for review."); see also Doc. 237 at 7 (Order on Motion to Reconsider confirming this holding).

The Court therefore lacks subject matter jurisdiction over this claim since, "[a]s with standing, ripeness is a question of subject matter jurisdiction." *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019). If a "claim is not ripe," then "no case or controversy presently exists, and the district court [i]s without subject matter jurisdiction over that claim." *Greenspring Racquet Club, Inc. v. Baltimore Cnty.*, No. 99-2444, No. 00-1012, 2000 U.S. App. LEXIS 27207, at *12 (4th Cir. 2000) (per curiam) (unpublished).

As a result, dismissal as unripe is not a failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), but rather a dismissal "under Federal Rule of Civil Procedure 12(b)(1), governing the dismissal of claims for lack of subject matter jurisdiction." *Id.* And when the court dismisses a claim for being unripe, "it [i]s precluded from dismissing that claim on the merits with prejudice." *Id.* at *13. This is in accord with recent holdings that "'dismissal for lack of standing—or any other defect in subject matter

jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits.’’ *Goldman v. Brink*, 41 F.4th 366, 369 (4th Cir. 2022) (quoting *S. Walk at Broadlands Homeowner’s Ass’n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013)); *Ali v. Hogan*, 26 F.4th 587, 600 (4th Cir. 2022) (modifying judgment on appeal to be dismissal without prejudice after finding lack of subject matter jurisdiction); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”).

Additionally, a dismissal without prejudice is required for consistency with this Court’s prior determination that “[s]hould the BoE rescind the cure procedure, Plaintiffs may bring suit to enforce their procedural due process rights.” Doc. 224 at 32.

Accordingly, to bring its judgment into compliance with U.S. Court of Appeals for the Fourth Circuit precedents, this

Court must amend the proposed judgment and order to dismiss Count Two without prejudice.

Dated: March 8, 2023. Respectfully submitted,

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WORD CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for the above Plaintiffs' Objection to Court's Proposed Judgment is 501 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of Microsoft Word, which was used to prepare the brief.

/s/ Hilary Harris Klein
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